

**Commonwealth of Virginia  
State Air Pollution Control Board**

**Comments of Pepco on the Draft Orders for Mirant Potomac River, LLC**

**May 4, 2007**

The Virginia Air Pollution Control Board ("the Board") has provided for comment two draft orders for the operation of the Potomac River Generating Station ("Potomac River plant"), operated by Mirant Potomac River LLC ("Mirant"). One is styled as an Order by Consent, representing the position of the Virginia Department of Environmental Quality ("DEQ"). The other is styled as a draft Order, representing the position of the City of Alexandria. Potomac Electric Power Company ("Pepco"), an operating subsidiary of Pepco Holdings Inc. that provides electric service to Washington, D.C. and surrounding areas, files these comments in response to the draft Orders.

**Recommendations**

1. Pepco requests that the Board support an order that clearly provides for operation of the Potomac River plant sufficient to ensure reliable service for central Washington, D.C. An order must be approved by June 1, 2007, the date of expiration of an Administrative Consent Order ("ACO") of the U.S. Environmental Protection Agency ("EPA") setting conditions under which the plant is to operate. Pepco expects to complete work on new transmission facilities during June, as described below. This work requires that the Potomac River plant operate during that time in order to maintain electric reliability.
2. With the assumption that under the DEQ draft Order by Consent, Mirant will continue to operate the Potomac River plant in accordance with DOE's Emergency Order, and, therefore, sufficient to respond fully with up to five units - during Pepco's scheduled line outage situations - to the dispatch instructions of PJM Interconnection LLC ("PJM"), the regional transmission grid operator charged with maintaining electric reliability for the District of Columbia and surrounding areas, Pepco believes that reliable service for central Washington, D.C. can be maintained if the DEQ draft order becomes effective.
3. In the alternative, Pepco requests that the Board support on an interim basis an order approving continued operation of the Potomac River plant in accordance with the terms of the EPA's ACO, until such time as the new transmission lines Pepco is constructing are in service. Pepco expects to have the new lines in service by July 1, 2007, which is 30 days after the expiration of the EPA's ACO. However, unanticipated difficulties could delay the in-service date of the new transmission lines. Therefore, it is imperative that the interim order remain in effect until the new lines are placed in service. Approval of an order consistent with this recommendation would assure sufficient operation of the Potomac River plant through the period when such operation is most needed. It also would afford the Board additional time to consider its position on a final order that appropriately balances various concerns in response to comments received in response to

the draft orders. The Board could address the Potomac River plant's longer-term operation at a subsequent meeting. A draft interim order is attached to these comments.

4. Any order must provide a clear statement of the interaction between the Department of Energy's ("DOE") Emergency Order and a State order, to avoid inconsistent compliance requirements. It should provide that operation consistent with a State order does not occasion liability for violation of air pollution laws or regulations.

5. The City of Alexandria's draft order should be rejected.

## **Background**

The Potomac River plant provides electricity for the central Washington, D.C. area. As DOE has noted, the Potomac River plant "is one of only three sources of electricity that serve the central business district of the District of Columbia, many federal institutions, the Georgetown area in D.C., as well as other portions of Northwest D.C., and the District of Columbia Water and Sewer Authority's Blue Plains Advanced Water Treatment Plant, the largest wastewater treatment plant in the world."<sup>1</sup> The other two sources of electricity for the central Washington, D.C. area are two 230 kilovolt transmission lines owned by Pepco. The Potomac River plant's operation at adequate levels, especially during line outage situations, is critical to maintaining electric reliability for the Nation's Capital.

Mirant shut down the Potomac River plant in August, 2005 in response to concerns raised by the DEQ about air emissions from the plant. Prompted by a request of the District of Columbia Public Service Commission ("DCPSC"), DOE issued an Emergency Order on December 20, 2005 requiring Mirant to produce a sufficient amount of electricity from the Potomac River plant to maintain electric reliability in Washington, D.C. The order was effective until October 1, 2006. That order has been extended to be effective until July 1, 2007. DOE's Order included a finding that "an emergency exists due to a shortage of electric energy, a shortage of facilities for the generation of electric energy, a shortage of facilities for the transmission of electric energy and other causes."<sup>2</sup>

Mirant has been meeting the requirements of DOE's Order by operation of the plant in accordance with a plan DOE set out, intended to ensure reliable electric service while accounting for air quality concerns. DOE's Order provides for operation of up to all five generating units of the Potomac River plant, in a manner sufficient to meet reliability needs. Specifically, the Order requires that Mirant:

shall keep as many units in operation, and shall take all other measures to reduce the start-up time of units not in operation, for the purpose of providing electricity

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<sup>1</sup> Department of Energy Emergency Order No. 202-05-3, p. 2-3. This order and subsequent orders extending and modifying it are referred to herein as the "DOE Order."

<sup>2</sup> Id, p. 1.

reliability, as “feasible.” For the purposes of this paragraph, “feasible” means as determined by the Department of Energy, after consideration of the plan submitted by Mirant pursuant to paragraph D of this order and after consultation with the Environmental Protection Agency, without regard to cost and without causing or significantly contributing to any exceedance of the NAAQS.<sup>3</sup>

On June 1, 2006, the EPA issued an Administrative Consent Order regarding operation of the Potomac River plant. This ACO expires on June 1, 2007.<sup>4</sup> It specifies standards for the plant’s operation under a variety of conditions consistent with DOE’s Order, and in a manner designed to minimize potential air emission violations, particularly with respect to SO<sub>2</sub>. During line outage situations, the order provides “Mirant shall operate the PRGS to produce the amount of power needed to meet the load demand in the Central D.C. area, as specified by PJM. During such operations, Mirant shall take all reasonable steps to limit the emissions of PM<sub>10</sub>, NO<sub>x</sub> and SO<sub>2</sub> from each boiler, including operating only the number of units necessary to meet PJM’s directive and optimizing its use of Trona injection to minimize SO<sub>2</sub> emissions.” It adds: “Nothing here shall diminish Mirant’s obligation to produce the amount of power needed to meet the load demand in the Central D.C. area, as specified by PJM, and in accordance with DOE’s Order.”<sup>5</sup>

In each of the major decisions by federal agencies described above, careful balancing has been done to assure the continued reliable provision of electricity in Washington D.C. while minimizing the environmental risk associated with continued operation of the plant. The DOE Order specifically balances the public health and welfare concerns associated with loss of electricity with possible air quality standard exceedances, in light of the important national security concerns associated with provision of a reliable supply of electricity to the central area of the Nation’s Capital.

In order to help ensure electric reliability in circumstances in which the Potomac River plant would not be able to operate, as well as to provide for growing electric demand in Washington, D.C., Pepco is undertaking the construction of two new 230 kilovolt transmission lines in addition to the two already in service. The existing two lines must be taken out of service consecutively in order to install and energize the two new lines. This work is expected to be completed by July 1, 2007, after the June 1 expiration of the ACO but before the July 1 expiration of the DOE Order.

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<sup>3</sup> Department of Energy Order No. 202-05-3.

<sup>4</sup> In the Matter of Mirant Potomac River LLC, Potomac River Generating Station, Docket No. CAA-03-2006-0163DA, issued June 1, 2006.

<sup>5</sup> Id, p. 15.

## Draft Orders Released for Comment by the Virginia Air Pollution Control Board

The most critical period of time for protecting reliability of the electric supply to the central Washington, D.C. area is during an outage of one or more of the transmission lines serving the that area. Both draft orders include in identical form the following sentence:

From the effective date of this Order, during a Line Outage Mirant *shall operate* the Facility to produce the amount of power needed to meet the load demand in the Washington, D.C. area, as specified by PJM and in accordance with the DOE Order.<sup>6</sup>

Although this language is substantially similar to paragraph C.1 of the EPA's ACO, accompanying provisions in the City draft order appear to contradict the intent of this provision, and may limit operation of the plant to an unacceptable level.

Both draft orders require the use of a new modeling structure not employed under the ACO. In combination with its enforcement provisions, the City draft order could result in only three units being available to operate. The DEQ draft order requires Mirant to operate "only *the higher of* the number of units necessary to meet PJM's directive pursuant to the DOE Order or the number that satisfy the predictive modeling,"<sup>7</sup> which clarifies its intent to assure sufficient operation to meet reliability needs. The City draft order, however, is missing the italicized language. The City's draft order thus obfuscates whether the plant may operate to the level required by DOE's Order.

The City draft order is directly contrary to language in the EPA ACO addressing liability for operation of the plant in accordance with the ACO and the DOE Order. The EPA's ACO provides:

If Mirant operates the [Potomac River plant] in accordance with dispatch directions from PJM and the relevant terms of this Order during Line Outage Situations, Mirant shall not be in violation of this Order; or [Virginia air law]; nor shall such operation be deemed to give a right for a cause of action for any alleged violation of the NAAQS as a result of Mirant causing or contributing to any modeled or monitored exceedance of the NAAQS.<sup>8</sup>

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<sup>6</sup> DEQ draft order, p. 15; City draft order, p. 11. [Emphasis added].

<sup>7</sup> DEQ draft order, p. 15. [Emphasis added].

<sup>8</sup> Id.

By contrast, the City draft order provides just the opposite, stating that “None of the provisions of this Order shall constitute a waiver from enforcement for any exceedance of the NAAQS for the duration of the Order.”<sup>9</sup>

As a result of the provisions added and omitted in the City draft order, as compared to the EPA ACO, the City draft order strikes a very different balance among electric reliability and air quality concerns than has been done by the federal agencies charged with implementing the Federal Power Act and the Clean Air Act. In addition, the City draft order appears to attempt to impose conflicting compliance requirements. As the DOE Order, the EPA ACO, and the DEQ draft order appear to recognize, it may be physically impossible during line outage situations to meet both the electric reliability standards as required by the DOE Order and the air quality standards that apply under the Clean Air Act.

The City draft order therefore could result in the reduction of operations at the Potomac River plant below the level that DOE has repeatedly found is essential to meet the electric reliability needs of the Nation’s Capital.

To the extent these proposed orders override the balance struck by DOE in light of national security and public health and welfare concerns, they would raise questions under the U.S. Constitution. Here, DOE exercised power vested exclusively in the federal government by the Federal Power Act (“FPA”), in an area that implicates both the interstate flow of electricity and national security concerns. It is well established that a State or local government cannot interfere with a valid exercise of federal authority.<sup>10</sup> Furthermore, due process requires that affected persons be given “a reasonable opportunity to know what is prohibited so that [they] may act accordingly.”<sup>11</sup> An order that imposes inconsistent compliance requirements does not comport with due process, because it does not inform affected persons of how to conform their conduct to the law.<sup>12</sup> We encourage the Board not to adopt an order that raises those problems.

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<sup>9</sup> City draft order, p. 13.

<sup>10</sup> See, e.g., *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (The supremacy clause “immunizes the activities of the Federal Government from state interference.”); *Hancock v. Train*, 426 U.S. 167, 179 (1976) (State could not prevent the operation of a federally owned power facility pending receipt of a State environmental permit).

<sup>11</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

<sup>12</sup> See, e.g., *Jersey Central Power & Light Co. v. Township of Lacey*, 772 F. 2d 1103 (3d Cir. 1985), cert. denied, 475 U.S. 1013 (1986) (A local law that is unconstitutional is void and unenforceable).



The DEQ draft order is not without troubling language that Pepco would prefer to have deleted. For example, Pepco is concerned that the following language not result in operation of the Potomac River plant at a level insufficient to meet reliability needs:

[T]he DOE Order in combination with the EPA ACO are not protective of the NAAQS to the extent they allow a monitored NAAQS exceedance during a Line Outage Situation. The Board finds that an extension of the relief provided in the EPA ACO during Line Outage Situations is *not* in the best interest of the Commonwealth.<sup>13</sup>

Furthermore, both draft orders lack a key provision of the EPA ACO, specifically, a statement clarifying the interaction between DOE's Order and the environmental agency's order. The EPA ACO states:

Nothing here shall diminish Mirant's obligation to produce the amount of power needed to meet the load demand in the central D.C. area, as specified by PJM, and in accordance with DOE's Order.<sup>14</sup>

It would be preferable to include this sentence in any final State order, in order to provide further assurance that that obligation will be met.

As noted in Pepco's recommendations above, with the assumption that under the DEQ draft Order by Consent, Mirant will continue to operate the Potomac River plant in accordance with the DOE's Order and, therefore, sufficient to respond fully with up to five units - particularly in line outage situations - to the dispatch instructions of PJM, Pepco believes that reliable service for central Washington, D.C. can be maintained if the DEQ draft order becomes effective.

Pepco is installing two new 230 kilovolt circuits to serve the affected area of the District of Columbia. Because the Potomac River plant is presently able to operate at a sufficient level during line outage situations, Pepco is able temporarily to take one line at a time out of service, which is required in order to energize the new lines. During the time when each existing line is out of service - including in June, 2007, after the first new line has been energized and while one new line and one pre-existing one will be operating - the affected area will be served by fewer transformers than normal. In the District of Columbia, June records some of the highest electric usage days of the year.

While reliable electric service can be maintained with the Potomac River plant operating in accordance with the DOE Order and the EPA ACO, its operation at reduced levels resulting from the City draft order could prevent Pepco from completing its work to energize both of the new transmission lines. Expiration of DOE's Order on July 1, 2007 was predicated on these

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<sup>13</sup> Id, p. 9. [Emphasis added].


<sup>14</sup> ACO, p. 14.

transmission lines being placed in service by that date. The Board may wish to consult DOE to determine whether it will require continued operation of the plant after July 1 if the Board's actions prevent the lines from being placed in service by that time.

## **Conclusion**

Pepco requests that the Board support the recommendations Pepco has provided above in order to assure the ability to continue to provide reliable electric service for the Nation's Capital, particularly during such time as Pepco is completing its work to energize its two new 230 kilovolt transmission lines to serve the area the Potomac River plant serves. An order that provides for less service than necessary to meet reliability needs would entail significant health and safety risks for the residents of Washington, D.C., conflict with the DOE Order, effectively preclude Pepco from completing the transmission improvements necessary to reduce the electricity system's reliance on the Potomac River plant, and raise additional problems of federal law. The Potomac River plant's operation as described in the DEQ's draft order - again, with the assumption that it enables the Potomac River plant sufficiently to respond to PJM's dispatch instructions to assure electric reliability - or consistent with the terms of the EPA's ACO on an interim basis, present reasonable solutions appropriately balancing the interests of the parties involved.

Respectfully Submitted,



Kirk J. Emge  
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May 4, 2007

Attachment

cc: U.S. Department of Energy  
Virginia Department of Environmental Quality

**Attachment**

**COMMONWEALTH OF VIRGINIA  
STATE AIR POLLUTION CONTROL BOARD**

**ORDER BY CONSENT**

**ISSUED TO**

**MIRANT POTOMAC RIVER, LLC  
Registration No. 70228**

**SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code §§ 10.1-1307D and 10.1-1307.1, between the Department of Environmental Quality and Mirant Potomac River, LLC for the purpose of ensuring reliability of electric service to the District of Columbia in accordance with Department of Energy Emergency Order No. 202-05-3, as modified and extended, and compliance with ambient air quality standards incorporated at 9 VAC Chapter 30, 9 VAC 5-20-180I, and Va. Code § 10.1-1307.3(3) at the Potomac River Power Station located in Alexandria, Virginia.

**SECTION B: Agreement and Order**

1. By virtue of the authority granted it in Va. Code §§ 10.1-1307D and 10.1-1307.1, the Department orders Mirant, and Mirant agrees, to perform the actions described in the United States Environmental Protection Agency Administrative Compliance Order by Consent (“EPA ACO”), in the matter of Mirant Potomac River LLC, Potomac River Generating Station, Docket No. CAA-03-2006-0163-DA, dated June 1, 2006, subject to the terms and conditions of the EPA ACO, which is hereby incorporated by reference.
2. This Order shall become effective upon occurrence of both of the following:
  - a. “Execution by both the Director of the Department of Environmental Quality or his designee and Mirant.
  - b. “Expiration of the EPA ACO.
3. This Order shall continue in effect until the energizing of both new 230kV transmission lines described in Pepco’s Notice of Planned 230kV Circuit Planned Outages to the Department of Energy “DOE”) on November 27, 2006, which outages Pepco has informed DOE are scheduled to end on or about July 1, 2007.



AND IT IS ORDERED this \_\_\_\_ day of \_\_\_\_\_ 2007.

By: \_\_\_\_\_  
David K. Paylor, Director  
Department of Environmental Quality

Mirant Potomac River, LLC, voluntarily agrees to the issuance of this Order.

Mirant by: \_\_\_\_\_

The foregoing instrument was signed and acknowledged before me on this \_\_\_\_ day of  
\_\_\_\_\_ 2007 by \_\_\_\_\_ of Mirant Potomac River, LLC, in the City of  
\_\_\_\_\_, Commonwealth of Virginia.

\_\_\_\_\_  
Notary Public

My Commission expires: \_\_\_\_\_